

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Skoro

Opposition Nos. 97,223
97,274

THIS DISPOSITION IS
NOT CITABLE AS PRECEDENT
OF THE TTAB 6/2/98

United States Olympic
Committee

v.

Lifetime Products, Inc.

Opposition Nos. 96,029
96,808
97,273
97,542

USA Basketball and
NBA Properties, Inc.

v.

Lifetime Products, Inc.¹

Before Sams, Cissel and Seeherman, Administrative Trademark
Judges.

Four applications have been filed by Lifetime Products,
Inc. for the mark TEAM USA and design, as shown below, for
various basketball-related products² in classes 28 and 25.

¹ The parties are requested to put all proceeding numbers in
the caption of all papers filed with the Board.

² The specific items identified in the applications are
"portable basketball standards, backboards and goals", Serial No.
74/483,534, filed January 26, 1994; "basketballs", Serial No.

The applications have been opposed by the United States Olympic Committee,³ claiming priority of use of TEAM USA for promoting Olympic Games and in connection with various goods, and also in connection with various services.

Opposer alleges that applicant's use of TEAM USA and design in connection with the identified goods is likely to cause confusion, mistake, or to deceive and falsely suggests a connection with opposer. Applicant denied all the salient allegations.

This case now comes up on opposer's motion for summary judgment, filed August 30, 1996. As grounds for the motion, opposer states that it has been using TEAM USA on T-shirts through its licensee, J.C. Penney, since 1991; that it has been using TEAM USA in connection with sports teams, including basketball, through its member organization, USA Basketball, since May, 1993; and that the press has been

74/438,258, filed September 21, 1993; "clothing, namely, t-shirts and athletic shorts", Serial No. 74/438,259, filed September 21, 1993; and "basketball backboards", Serial no. 74/424,228, filed August 13, 1993. All allege a bona fide intention to use the mark in commerce

³ USA Basketball and NBA Properties, Inc., initially filed oppositions to the involved applications, but have since assigned their rights in the mark to the United States Olympic Committee, resulting in the consolidation of these proceedings.

reflecting the public's association of TEAM USA with the Olympics, and hence opposer, since 1987. In addition to asserting its priority, opposer contends that there is a likelihood of confusion between the marks in that the marks themselves are virtually identical; that the goods of applicant are closely related to the goods and services of opposer, having the same customers and the same channels of trade; and that, given the fame of opposer's marks, the public is given the mistaken impression that applicant's goods are endorsed by opposer.⁴

Applicant responds, contending that opposer has not provided a copy of any license agreement with J.C. Penney, or any other evidence that J.C. Penney was licensed to use TEAM USA, and therefore J.C. Penney's use of the mark does not inure to opposer; that J.C. Penney's use on t-shirts is ornamentation and not trademark use; that the evidence of use by USA Basketball is a press release and does not demonstrate trademark or service mark use; and opposer's claimed analogous use by the press shows an inconsistency. Thus, according to applicant, opposer has failed to establish priority. As to likelihood of confusion, applicant contends that there is no evidence of use on any

⁴ Opposer further indicates that it has filed two applications for registration of the mark TEAM USA, Serial nos. 74/552,713 and 74/552,714, on May 10, 1994. These filings are not before the Board in this proceeding.

goods by opposer; that the marks are not similar given applicant's disclaimer of USA and the inclusion of applicant's design element; that opposer has not established the fame of its mark; that opposer's mark is weak; and that consumers are careful in their purchase of basketball equipment.

The burden is on the party moving for summary judgment to demonstrate the absence of any genuine issue of material fact, and that it is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c). See also, Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The evidence of record and any inferences which may be drawn from the underlying undisputed facts must be viewed in the light most favorable to the non-moving party. See, Olde Tyme Foods Inc. v. Roundy's Inc., 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). In considering the propriety of summary judgment, the Board may not resolve issues of material fact against the non-moving party; it may only ascertain whether such issues are present. See, Opryland USA, Inc. v. Great American Music Show, Inc., 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1993); and Lloyd's Food Products Inc. v. Eli's Inc., 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993).

In certain cases, however, even though disputes remain with respect to certain material facts, summary judgment may be granted, so long as all factual disputes are resolved in

favor of the non-moving party and inferences drawn from the undisputed facts are viewed in the light most favorable to the non-moving party. See, Larry Harmon Pictures Corp. v. The William's Restaurant Corp., 929 F.2d 662, 18 USPQ2d 1292, 1293 (Fed. Cir. 1991); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor"); and Bishop v. Wood, 426 U.S. 341, n.11 (1976) ("In granting summary judgment for respondents, the District Court was required to resolve all genuine disputes as to material facts in favor of petitioner.").

In this case, opposer has provided an affidavit from Kim Raymer, the Vice President of Spelcor, the supplier of screenprinted clothing to J.C. Penney, who documents working with J.C. Penney in the creation of clothing designs incorporating the mark TEAM USA, having them approved by opposer, and offering them for sale in or about October 1991. Opposer has also provided an affidavit from Craig Miller, the Assistant Executive Director - Public Relations for USA Basketball, who documents that USA Basketball is a member of the United States Olympic Committee and the National Governing Body in the United States for basketball; that USA Basketball has been using the mark TEAM USA to promote the sport of basketball and the activities of USA

Basketball since May 5, 1993; and that USA Basketball assigned all right, title and interest in the trademark TEAM USA to opposer effective January 1, 1996. Finally, opposer has provided print outs from the Westlaw® database of news articles,⁵ dating back to 1988, demonstrating the use by the press of TEAM USA in connection with the Olympics and basketball.

In an effort to demonstrate the presence of a genuine issue of material fact, applicant has submitted the affidavit of Craig J. Madson,⁶ trademark counsel for applicant, who argues the failure of opposer's evidence and submits three articles retrieved from an electronic database, as well as examples of applicant's actual use of its mark in 1996.

⁵ Applicant contends that opposer has been selective in its submission of articles which support its position, that there may be articles which refer to TEAM USA in a different context, but that such articles are uniquely within the possession and control of opposer. The electronic databases which can be used to retrieve articles published in the media of general circulation are equally available to both parties. See 37 C.F.R. § 2.122(e). Applicant should have submitted those articles which it contends contradict opposer's position. We note that applicant has submitted three recent articles from an unidentified database; this demonstrates the availability of the information.

⁶ Opposer has moved to strike this affidavit, contending that it is not based on Mr. Madson's personal knowledge, does not contain statements of fact which are admissible in evidence, in that they are based on 'information and belief', and constitutes factual testimony by Mr. Madson on behalf of his client. In that Mr. Madson's affidavit is the full extent of the support for applicant's opposition to the motion for summary judgment, and it is necessary that we view facts in a light most favorable to applicant, opposer's motion to strike is denied.

Opposer has filed a reply brief.⁷

We find, from the evidence submitted by the parties, that there exists no genuine issue of fact that opposer authorized the design and sale of t-shirts and other articles of clothing bearing TEAM USA in 1991, through one of its licensees, J.C. Penney,;⁸ that one of opposer's member organizations, USA Basketball, has used TEAM USA in connection with a basketball team composed of top college players in international competitions since May, 1993, prior to applicant's filing date;⁹ and that there is a strong connection made by the American public between the term TEAM USA and the Olympics and international sporting competitions, as reflected in the press.¹⁰ Opposer has also provided documents establishing the use of TEAM USA as a

⁷ Because opposer's motion for leave to file a reply brief in support of its motion for summary judgment is, in our opinion, well taken, the motion is granted, and opposer's reply brief and supporting materials have been considered in our determination of this case.

⁸ This is supported by the affidavit of Kim Raymer with supporting documentation.

⁹ This is supported by the affidavit of Craig Miller with supporting documentation. Applicant has not challenged the relationship between opposer and USA Basketball, or any of opposer's member organizations.

¹⁰ This is supported by some 91 articles retrieved from the Westlaw® database drawn from national and local newspapers throughout the United States prior to applicant's constructive use date.

mark on clothing and in connection with promoting amateur sports, prior to 1993.¹¹

Conversely, applicant has offered no contradictory evidence on summary judgment as to priority of use.¹² Applicant has established that applicant actually used its mark on basketball backboards in 1996; and that it has a constructive use date of August 13, 1993 based on the filing date of the opposed application.

In that opposer has established use of the mark on dates which precede applicant's constructive use date, we find that there is no genuine issue of material fact as to priority of use of the mark TEAM USA by opposer.

We turn next to the issue of likelihood of confusion. Having carefully considered the materials and arguments submitted by the parties in connection with the issue of a

¹¹ These are documents opposer produced in response to applicant's 56(f) discovery: a photograph of T-shirts bearing the mark on the 1992 J.C. Penney catalog (OPP00030, OPP00255-257); a brochure on Olympic baseball using the mark as a service mark (OPP00036); use of the mark on amateur bowling paraphernalia contained in a 1993 catalog (OPP00247-254); use of the mark on Sara Lee Knit/Hanes licensed products accompanied by a July 1, 1993 sales invoice (OPP00277-78, OPP00283-284); and a 1993 advertisement by CBS identifying TEAM USA as a trademark of the USOC.

¹² Applicant argues that opposer has not established that the use of TEAM USA by J.C. Penney and USA Basketball inures to opposer, because opposer has not produced its license agreements. However, in applicant's request for 56(f) discovery, applicant asked for documents describing opposer's control over its marks and opposer stated it would produce the license agreements subject to an appropriate protective order. Applicant cannot now be heard to complain and draw inferences from the absence of evidence it has not availed itself of.

likelihood of confusion, we find that the marks are virtually identical: TEAM USA and TEAM USA and design. Applicant argues that its design is dominant because "USA" has been disclaimed, and it is dissimilar to the design features used by opposer. We do not agree. Any design element of opposer's mark is not before the Board. Applicant's design element consists of a stylized typeface and a star, which are insufficient to distinguish the two marks, while the literal portion of applicant's mark is identical to opposer's mark: TEAM USA. If a mark comprises both words and a design, greater weight is often given to the words, which are what purchasers use in requesting the goods. In re Appetito Provisions Co. Inc., 3 USPQ2d 1553, 1554 (TTAB 1987). It is just as likely that purchasers will see the design element as a variant of opposer's word mark.

Further, there is no genuine issue of material fact that the parties' respective goods are related. Applicant describes some of its goods as t-shirts and athletic shorts and opposer, through its licensees, uses its mark on clothing, thus establishing use of the parties' marks on the same goods. Further, it is established that opposer uses its mark to organize and promote sports teams, including basketball. Opposer has licensees which produce numerous officially licensed products, including mini and regulation basketballs (Ace Novelty) and sports bags (Innovo Group),

and these items appear in advertisements of opposer's officially licensed goods (OPP00295). Applicant's goods are identified as basketballs, portable basketball standards, backboards and goals. Thus, opposer has established that the parties' goods are related.

As to the channels of trade, applicant contends that a significant difference lies in the fact that applicant's goods are being sold in sporting goods stores and large retail chains, and that opposer has not established any channels of trade of its own. However, applicant's goods, as identified in its applications, are not limited to specific channels of trade and must therefore be deemed to be sold in all channels appropriate for such goods. Therefore, applicant's t-shirts must be considered to be sold in the same channels of trade as opposer's t-shirts. Moreover, opposer has established that its licensed t-shirts have been sold in at least one large retail chain.

Considering the substantial similarities between the marks, we find that, when used on the identified goods and services, confusion is likely to result.

Therefore, because the Board finds that there is no genuine issue of material fact on the issues of priority and likelihood of confusion, and that opposer is entitled to judgment as a matter of law, opposer's motion for summary judgment is granted. Judgment is hereby entered against

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applicant, the opposition is sustained and registration to applicant is refused.

J. D. Sams

R. F. Cissel

E. J. Seeherman
Administrative Trademark
Judges, Trademark Trial
and Appeal Board